

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
CARLOS H. MCKENSI,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:09-cv-11940-JGD
)	
BANK OF AMERICA, N.A.,)	
)	
Defendant.)	
_____)	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

Plaintiff, Carlos H. McKensi, respectfully submits this memorandum in support of the accompanying Motion for Leave to File a First Amended Complaint. The First Amended Complaint is attached to the motion. In its First Amended Complaint, eliminates one count and allegation, and adds three separate causes of action predicated on the original lender's violation of Massachusetts General Law, 93A, which has rendered the underlying agreement unenforceable.

Plaintiff has acted reasonably promptly in moving to amend its complaint. In addition, Defendant will not suffer undue prejudice as the result of the amendment of the complaint. The scheduling conference has not yet taken place, discovery has not even begun, and Defendant has yet to file an answer to the original Complaint.

STATEMENT OF FACTS

Plaintiff filed his original complaint with the Middlesex Superior Court in Woburn, Massachusetts on October 19, 2009., seeking injunctive relief to prevent the Defendant from foreclosing on his property the following day. A temporary restraining order was issued, with a short order of notice granted for a hearing to be held on October 29, 2009, to consider why a preliminary injunction should be granted. Original counsel for the defense requested that said

hearing be postponed. Prior to said hearing being re-scheduled, Defendant's current counsel made an appearance and immediately removed this case to Federal Court on November 12, 2009. On November 17, 2009, Defendant filed a Motion to Dismiss or, In the Alternative, Motion for a More Definite Statement. The scheduling conference is set for January 13, 2010, at which time a hearing will be held on Defendant's Motion to Dismiss.

After reviewing Defendant's to Dismiss or, In the Alternative, Motion for a More Definite Statement, Plaintiff's counsel now seeks leave to file a First Amended Complaint - to voluntarily remove an initial claim asserted, while fleshing out with more specificity the meritorious claims referenced as grounds in the original complaint for the granting of the restraining order.

ARGUMENT

Any opposition by Defendant to Plaintiff's motion to amend should be rejected. Pursuant to Federal Rule of Civil Procedure 15(a)(2), leave to amend "shall be freely given when justice so requires" and "this mandate is to be heeded". *Forman v. Davis*, 371 U.S. 178, 182 (1962). Rule 15 embodies a "liberal" amendment policy, and "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Benitez-Allende v. Alcan Alumino do Brasil, S.A.*, 857 F.2d 26, 36 (1st Cir. 1988).

The situations in which courts may deny a motion to amend are "limited" and include "undue delay, bad faith, futility and the absence of diligence of the movant's part." *Torres-Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir. 2007). None of these reasons provide a basis for denying leave to amend in this case. Plaintiff is not acting in bad faith, but rather to clarify issues and add meritorious claims. *See Spears v. Somers Sanitation Service, Inc.*, 162 F.R.D. 1, 2 (D. Mass. 1995).

Defendant has no basis for asserting this amendment would cause them prejudice. Defendant has ample opportunity to continue preparing its case as it sees fit. In fact, discovery has yet to even commence. *See New Balance Athletic Shoe, Inc. v. Puma USA, Inc.*, 118 F.R.D. 17, 21 (D. Mass. 1987) (allowing a motion to amend because parties had completed "only initial discovery" and thus "should be able to prepare their defense to these new claims.").

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court grant Defendant leave to amend his Complaint in accordance with the Amended Complaint appended hereto as Exhibit A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing was filed electronically with the Clerk of the Court using CM/ECF this 11th day of January, 2010.

/s/ Matthew E. Forbes, Esq.

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